

To: Tom Hagler/R9/USEPA/US@EPA[]
From: "Obegi, Doug"
Sent: Tue 8/28/2012 11:59:24 PM
Subject: porter cologne
§ 13242

From the State Water Resources Control Bd. Cases, 136 Cal.App.4th 674, 775-777 (2006):

Determining what actions were required to achieve the narrative salmon protection objective was part of the Board's obligation in formulating the 1995 Bay-Delta Plan in the first place. (See §§ 13050, subd. (j)(3) [a water quality control plan must include "[a] program of implementation needed for achieving water quality objectives"], 13242, subd. (a) [a "program of implementation for achieving water quality objectives" must include "[a] description of the nature of actions which are necessary to achieve the objectives"].) Once the Board established specific flow objectives and the narrative salmon protection objective as part of the 1995 Bay-Delta Plan and then established that part of its program of implementation for the salmon *776 objective would be to allocate responsibility for meeting those flow objectives in a water rights proceeding, the Board had no obligation in this water rights proceeding to determine whether other flow objectives should be imposed to achieve the salmon objective. Instead, its obligation was to actually implement the specific flow objectives it had committed itself to implementing.

The Board's acknowledgement in the 1995 Bay-Delta Plan of the "uncertain[ty]" that "implementation of the numeric objectives ... alone will result in achieving the narrative objective for salmon protection" did not compel the Board to consider adopting other flow objectives in this proceeding. This uncertainty was simply offered as the reason why "other measures" "in addition to timely completion of a water rights proceeding" might "be necessary to achieve the [salmon protection] objective."

Nor was the Board obligated to consider adopting other flow objectives because, as the Audubon Society parties put it, "implementation of [the salmon protection] standard [had to] be 'immediate.'" Again, the Audubon Society parties have misapprehended the requirements of the 1995 Bay-Delta Plan.

**271 In the program for implementation in the 1995 Bay-Delta Plan, the Board stated generally that "[t]he specific actions [to achieve the objectives] identified within [this program of implementation] include time schedules for implementation, if appropriate. If no time schedule is included, implementation should be immediate." (See § 13242, subds. (a), (b) [a "program of implementation for achieving water quality objectives" must include "[a] time schedule for the actions to be taken" "which are necessary to achieve the objectives"].) As we have explained already, with respect to the narrative objective for salmon protection, the program for implementation identified "timely completion of a water rights proceeding to implement river flow and operational requirements" as one of the actions that would need to be taken to implement the salmon protection objective. Thus, the "time schedule" for taking this particular action would be met as long as the proceeding was, in fact, timely completed.

Even if the “immediacy” provision in the 1995 Bay–Delta Plan could be deemed to apply in this context, nothing in the 1995 Bay–Delta Plan required the Board to consider or adopt flow requirements in this water rights proceeding other than those it had set in the 1995 Bay–Delta Plan. The Board's commitment to implement “river flow and operational requirements” was a commitment to implement the river flow and operational objectives set within the 1995 Bay–Delta Plan itself. Thus, at most, the 1995 Bay–Delta Plan contemplated the immediate commencement and timely completion of a water rights proceeding to allocate responsibility for meeting the flow *777 objectives set in the plan; it did not contemplate that the water rights proceeding would include the investigation of or allocation of responsibility for meeting flow objectives other than those set in the 1995 Bay–Delta Plan.

If the Audubon Society parties are correct in their contention that scientific evidence shows the flows needed to achieve the narrative salmon protection objective must be greater than the Vernalis flow objectives of the 1995 Bay–Delta Plan, then that evidence may provide a basis for changing the Vernalis flow objectives in the next regulatory proceeding to review and revise the water quality control plan for the Bay–Delta. It does not, however, provide a basis for challenging the Board's action here. In the 1995 Bay–Delta Plan, the only action to which the Board committed itself in this water rights proceeding with respect to the narrative salmon protection objective was allocating responsibility for meeting the flow objectives in the 1995 Bay–Delta Plan.

Doug Obegi

Staff Attorney

Water Program

Natural Resources Defense Council

111 Sutter Street, 20th Floor

San Francisco, CA 94104

415.875.6100 (phone)

415.875.6161 (facsimile)